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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1500

DON R. ERICKSON, Warden, South Dakota State Penitentiary,
Petitioner,

v.

United States of America ex rel. JOHN LEE FEATHER,
United States of America ex rel. LAVERNE BLACK THUNDER,
United States of America ex rel. AMBROSE ST. JOHN,
United States of America ex rel. JAMES R. KEEBLE,
United States of America ex rel. CURTIS SMALL,
United States of America ex rel. ROMAN V. DERBY,
United States of America ex rel. JOSEPH DAY,
United States of America ex rel. ARNOLD LAFROMBOISE,
United States of America ex rel. CLARENCE WALKER,
United States of America ex rel. THEODORE DUANE WYNDE,
Respondents.

[redacted] BRIEF AMICI CURIAE OF ARAPAHOE TRIBE OF WIND RIVER RESERVATION, WYOMING, THREE AFFILIATED TRIBES OF FORT BERTHOLD RESERVATION, NORTH DAKOTA, AND CONFEDERATED SALISH AND KOOTENAI TRIBES OF FLATHEAD RESERVATION, MONTANA

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Respondents.

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

The Arapahoe Tribe of the Wind River Reservation, Wyoming, the Three Affiliated Tribes of the Fort Berthold Reservation, North Dakota, and the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana respectfully move this Court for leave to file the accompanying brief, as *amici curiae*, in support of the position of respondents in the above-entitled cause and, of natural consequence, the position of petitioner in *DeCoteau* v. *District County Court*, No. 73-1148.

In support of this motion, your *amici* state that their interests in these cases are set forth in the accompanying brief. The Tribes have sought and received the consent of the parties they support for the filing of this attached brief *amici curiae*. The Attorney General of the State of South Dakota has refused to grant such consent.

We believe that the attached brief will assist this Court in its consideration of this important area of Indian law in general, and the proper construction of the Lake Traverse settlement statute in particular.

Respectfully submitted,

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STATEMENT OF INTEREST

The tribal entities filing this motion, as *amici curiae*, are all federally recognized Indian tribes who reside

and govern their members on three reservations, all of which have been previously subjected to acts of Congress opening certain portions of the reservations to settlement by non-Indians.[1]

The question of what effect a "settlement statute" may have had upon the traditional boundaries of an Indian reservation, and upon the ability of an Indian tribe to exercise jurisdiction over the property and inhabitants of that reservation, is important to all American Indians, and has special significance for those Indian tribes, such as your *amici* herein, whose reservations have been opened to settlement.

While we strongly support the position of respondent Indians of the Lake Traverse Reservation, we believe that there are significant distinctions between the statute which opened the Lake Traverse Reservation to settlement and the statutes which opened the Fort Berthold, Flathead, and Wind River Reservations to settlement by non-Indians.

We feel that it is essential for the Court to have these distinctions in mind, which distinctions have not yet been developed by any existing party to this litigation, in the event the Court does not adopt the position of respondent Indians in this case.

I. RULES OF STATUTORY CONSTRUCTION GENERALLY APPLICABLE TO SETTLEMENT STATUTES.

The focal point of the *Feather* case is the so-called settlement statute (*i.e.*, Act of March 3, 1891, 26 Stat. 989, 1035), which was enacted by Congress admittedly

[1] Fort Berthold Reservation, North Dakota: Act of June 1, 1910, 36 Stat. 455. Wind River Reservation, Wyoming: Act of March 3, 1905, 33 Stat. 1016. Flathead Reservation, Montana: Act of April 23, 1904, 33 Stat. 302.

for the purpose of opening the Lake Traverse Indian Reservation to white settlement. The issue in suit is whether the lands so opened retained the status of an Indian reservation following the implementation of that Act. We are guided by certain fundamental principles previously developed by this Court for application in cases such as *Feather*. For example, we know that once Congress has established an Indian reservation, all tracts remain a part of that reservation until separated therefrom by Congress. *United States* v. *Celestine*, 215 U.S. 278 (1909). We know that the opening of a reservation for homestead settlement is not at all inconsistent with its continued existence as a reservation. *Seymour* v. *Superintendent*, 368 U.S. 351 (1962). We know too that the intent to abrogate treaty rights is not lightly imputed to Congress, *Menominee Tribe* v. *United States*, 391 U.S. 404 (1968), and that the principle of Indian freedom from state jurisdiction is well rooted in our history, *McClanahan* v. *State Tax Comm'n*, 411 U.S. 164 (1973); therefore, Congressional intent to disestablish a reservation must either be expressed on the face of the settlement act, or, where the terms of the act are ambiguous, be clearly discernible from the surrounding circumstances and legislative history. *Mattz* v. *Arnett*, 412 U.S. 481 (1973). Thus, it is clear that the reviewing court, in order to determine the proper effect of a settlement statute, must look first to the actual language of the statute and then, if necessary, to its legislative history, the circumstances surrounding its enactment, and its subsequent Congressional and administrative history.

For purposes of this argument, your *amici* will briefly review the various kinds of settlement statutes, categorizing each according to language, and will then briefly review the significant circumstances surrounding the enactment of the Lake Traverse statute, Act of March 3, 1891, 26 Stat. 989, 1035.

II. ANALYSIS OF VARIOUS SETTLEMENT STATUTES ENACTED BY CONGRESS DURING THE PERIOD 1890-1910.

The various settlement statutes can be divided into five major categories: (1) *trust-settlement* statutes; (2) *express cession-in-trust* statutes; (3) *surplus land* statutes; (4) *cession* statutes; and (5) *termination* statutes.[2]

With respect to these categories, your *amici* submit that a *trust-settlement* statute is clear on its face, precluding a finding of disestablishment in the absence of express subsequent Congressional action to the contrary; that in cases of the second and third categories (*i.e.*, *express cession-in-trust* statutes; *surplus land* statutes) the statutes on their face raise a presumption against disestablishment, which presumption can only be rebutted by a preponderance of contrary evidence; that a *termination* statute on its face raises a presumption for disestablishment, which presumption can only be rebutted by a preponderance of evidence showing, on the basis of the legislative history and surrounding circumstances, that no disestablishment was actually intended; and that *cession* statutes are ambiguous, on their face, and therefore raise no presumption; rather, that the reviewing court must interpret the peculiar provisions of each *cession* statute in accordance with its legislative history and surrounding circumstances. For reasons which will be amplified later, your *amici* believe that the Lake Traverse statute falls into this latter category, raising

[2] The italicized name for each general category of settlement statute has been adopted throughout this brief for identification purposes only. Where we say, for example, that a court considered a *trust-settlement* statute in a particular case, it should be noted that the court did not necessarily identify the statute by that name. Such reference means only that the court considered a settlement statute with the specific characteristics which we list in this brief under the category of *trust-settlement* statutes.

no presumption for or against disestablishment, but that the terms of the statute, when viewed in light of its legislative history and surrounding circumstances, support the conclusion that the lands of the Sisseton and Wahpeton Indians remained in a state of continuing reservation following the enactment and implementation of the Act of March 3, 1891.

1. A *trust-settlement* statute, in our opinion, clearly and definitively supports a finding of continued reservation status. Such statutes are characterized by an absence of "cession, sale or relinquishment" terminology; rather, the lands described in the statute are to be surveyed and appraised, after which time the "surplus" or "unallotted" lands of the reservation are to be opened for settlement under the "homestead and town-site" laws of the United States, pursuant to Presidential Proclamation prescribing the time and the manner in which the lands may be settled or occupied.[3] The Indians receive the net proceeds of the settlement, allotments where appropriate, and other incidental benefits.[3a] In fact,

[3] Fort Berthold Indian Reservation, North Dakota: Act of June 1, 1910, 36 Stat. 455; Cheyenne River and Standing Rock Indian Reservation, South Dakota and North Dakota: Act of May 29, 1908, 35 Stat. 460; Colville Indian Reservation, Washington: Act of March 22, 1906, 34 Stat. 80; Flathead Indian Reservation, Montana: Act of April 23, 1904, 33 Stat. 302.

[3a] In most instances, *trust-settlement* statutes contain additional provisions which reserve to the Indian tribe treaty rights not inconsistent with the terms of the settlement statute. For example, the Act of June 1, 1910, 36 Stat. 455, 459 (Fort Berthold) provides:

> . . . nothing in this Act shall be construed to deprive said Indians of Fort Berthold Indian Reservation of any benefits to which they are entitled under existing treaties or agreement not inconsistent with the provisions of this Act.

Accord: Act of May 29, 1908, 35 Stat. 460, 464 (Cheyenne River). The Eighth Circuit Court of Appeals, in *City of New Town* v. *United States*, 454 F.2d 121, 125 (8th Cir. 1972), has interpreted this provision as confirming that the original boundaries of the Ft.

there is nothing on the face of a *trust-settlement* statute which supports, or even remotely indicates, a Congressional intent to disestablish the opened area from the Indian reservation.

Perhaps more importantly, each *trust-settlement* statute is distinguished by the following language or a close variation thereof:

> "That nothing in this Act contained shall in any manner bind the United States to purchase any of the land herein described, except sections sixteen and thirty-six, or the equivalent in each township, or to dispose of said lands except as provided herein, or to guarantee to find purchasers for said lands or any portion thereof, *it being the intention of this Act that the United States shall act as trustee for said Indians* to dispose of said lands to and expend and pay over the proceeds received from the sale thereof only as received and as herein provided. . . ." [Emphasis supplied][4]

By including an express trust provision in the statute, the United States voluntarily assumes a special fiduciary responsibility with regard specifically to the disposition

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Berthold Indian Reservation were not altered by the 1910 settlement statute:

> The 1910 Act specifically recognized that the opening of the reservation for homesteading was not intended to deprive the Indians of any rights not inconsistent with the Act, and as *Seymour* establishes, homesteading is not inconsistent with the maintenance of the original reservation boundaries. The 1910 Act clearly by its own terms does not purport to alter the reservation boundaries.

See also Act of April 23, 1904, 33 Stat. 302, as amended, Act of May 29, 1908, 35 Stat. 444, 448-50, which reserve for the Flathead Indians "Winters doctrine" water rights in the settled reservation area. (*See Winters* v. *United States*, 207 U.S. 564 (1908)).

[4] 36 Stat. 455, 458-59 (Fort Berthold). *See also* 35 Stat. 460, 464 (Cheyenne River); 34 Stat. 80, 82 (Colville); 33 Stat. 302, 305-06 (Flathead).

of the Indians' surplus and unallotted reservation lands, over and above the fiduciary duty inherent in the federal government's traditional relationship to Indian tribes. That is to say, the United States agrees to dispose of the Indians' land in the best interests of its wards, and the Congressional intent or purpose behind any *trust-settlement* statute must be measured against this express assumption of stewardship. Your *amici* submit that whereas, in the late 1800's and early 1900's it was, in the opinion of some government officials, arguably in the best interest of certain Indian tribes to convert surplus and unallotted lands into a monetary equivalent (presumably for the purpose of exposing the Indians to the "civilizing" influence of white neighbors), it cannot be seriously contended that the government's outright disestablishment of Indian reservations and the consequent elimination of tribal jurisdiction over these reservation homelands could be considered in the best interests of the Indians.[5] To the contrary, we believe that such disestablishment, under ordinary circumstances, would constitute a gross abuse of trust. For this reason, your *amici* submit that in any instance where the terms of a settlement statute does not, on its face, indicate a Congressional intent to disestablish or deprive the Indian tribe of jurisdiction over its reservation lands, and where the United States expressly assumes a trustee's role for the disposition of surplus reservation land, it must be concluded, in the absence of express Congressional action to the contrary, that such disestablishment was never effected.

In *Seymour* v. *Superintendent*, *supra*, this Court considered the effect of a *trust-settlement* statute, the Act of March 22, 1906, 34 Stat. 80, on the southern half of

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[5] It should be noted that in most instances, the Indian reservation subject to settlement encompassed the aboriginal homelands of the resident Indian tribes.

the diminished Colville Indian Reservation. In a landmark decision, this Court held that tribal jurisdiction over the reservation continued, notwithstanding that the land had been opened to white settlement. Confronted with the interpretation of similar *trust-settlement* statutes, the Circuit Courts of Appeals, *United States ex rel. Feather* v. *Erickson*, 489 F.2d 99 (8th Cir. 1973);[6] *United States ex rel. Condon* v. *Erickson*, 478 F.2d 684 (8th Cir. 1973); *City of New Town* v. *United States*, 454 F.2d 121 (8th Cir. 1972), and federal district courts, *Confederated Salish and Kootenai Tribes* v. *Namen*, No. 2343 (D. Mont. August 14, 1974), have followed suit.[7]

2. In an *express cession-in-trust* statute, the Indians agree to "cede, grant and relinquish" defined portions of their Indian reservation to the United States, in consideration of which the United States agrees to dispose of the ceded land under the homestead and townsite laws of the United States, and to program the proceeds of settlement exclusively to the benefit of the Indians.[8] In addition, the United States expressly assumes a trustee's role to oversee the proper disposition of the Indian's property.[9] With regard to an *express cession-in-trust* statute, your *amici* submit that in each case where the settlement statute is not entirely clear on its face, but where the United States assumes the special duty of a trustee to dispose of the Indians' surplus lands in their

[6] The issue in the instant case was joined by the conflicting holding of the Supreme Court of the State of South Dakota in *DeCoteau* v. *District County Court*, —— S.D. ——, 211 N.W.2d 843 (1973).

[7] *But see Rosebud Sioux Tribe* v. *Kneip*, 375 F.Supp. 1065 (D. S.Dak. 1974).

[8] Wind River Indian Reservation, Wyoming: Act of March 3, 1905, 33 Stat. 1016; Crow Indian Reservation, Montana: Act of April 27, 1904, 33 Stat. 352.

[9] 33 Stat. 1016, 1020-21 (Wind River); 33 Stat. 352, 361-62 (Crow).

best interests, a presumption is raised that Congress did not intend to disestablish the reservation, and such presumption can only be rebutted by a clear and unequivocal showing of contrary Congressional action. In *Ash Sheep Co.* v. *United States*, 252 U.S. 159, 166 (1920), this Court relied primarily upon the trusteeship provision in the Act of April 27, 1904, 33 Stat. 352 in holding that said *express cession-in-trust* statute did not automatically convert the ceded portion of the Crow Reservation into "[p]ublic lands".

3. In *Mattz* v. *Arnett*, *supra*, this Court specifically considered a third class of settlement statute which declares certain Indian lands open to settlement under the homestead laws of the United States, without the use of cession, sale or relinquishment terminology. Further, the statute provides for Indian allotments, and for the application of settlement proceeds to the credit of resident Indians.[10] However, these *surplus land* statutes are distinguished from *trust-settlement* or *express cession-in-trust* statutes by the lack of a trusteeship provision. Nevertheless, this Court held in *Mattz* that the Act of June 17, 1892, 27 Stat. 52, a *surplus land* statute, did not disestablish the Klamath River Reservation, notwithstanding a substantial body of evidence which tended to show a prior Congressional intent to disestablish the reservation, and an apparent partial abandonment of the reservation by the former resident Indians. The inescapable conclusion is that the evidence supporting disestablishment, although substantial, was not clear and convincing and, hence, did not rebut the presumption against disestablishment. And again, the Circuit Courts of Appeals have followed suit. See the recent case of *United States* v. *Washington*, 496 F.2d 620 (9th Cir. 1974), wherein the Ninth Circuit upheld the continuing

[10] Klamath River Indian Reservation, California: Act of June 17, 1892, 27 Stat. 52.

existence of the Puyallup Indian Reservation,[11] basing said holding squarely on *Mattz* v. *Arnett*, *supra*.

4. We come to a fourth type of settlement statute, *i.e.*, *cession* statute, which is characterized by elements of sale, and by elements of trust, although the United States expressly assumes no trusteeship. These statutes are invariably accompanied by a confusing and contradictory legislative history which, no doubt, can be attributed in large part to the ambiguous nature of the language itself. With regard to cession statutes, your *amici* submit that no presumption arises in favor either of disestablishment or continuing reservation status. Rather, the reviewing court must carefully consider the provisions of the statute in the clarifying light of its legislative history and surrounding circumstances and discern therefrom the Congressional intent. As defined herein the Act of March 3, 1891, 26 Stat. 989, 1035, which opened the Lake Traverse Reservation to settlement, is an example of a *cession* statute.[12]

5. Congress has enacted a fifth type of settlement statute, *i.e.*, *termination statute*, which clearly effects a disestablishment of the settled reservation area through an absolute or unqualified sale or cession of land to the United States for stated consideration.[13] To be sure,

[11] The Puyallup Indian Reservation was opened by the Act of March 3, 1893, 27 Stat. 612, 633, a *surplus land* statute directly comparable to the settlement statute considered by this Court in *Mattz*.

[12] *See* discussion *infra* at 14-21 for an analysis of the significant circumstances surrounding the Lake Traverse statute which confirm, in our opinion, that this particular cession statute did not effect a termination or disestablishment of the reservation.

[13] Navajo Indian Reservation, New Mexico: Act of May 29, 1908, 35 Stat. 444, 457; Ponca, Otoe and Missouria Indian Reservations: Act of April 21, 1904, 33 Stat. 189, 217; Colville Indian Reservation, Washington, Act of July 1, 1892, 27 Stat. 62; Smith River

these statutes on their face expressly utilize the terminology of disestablishment.[14] Of course, the United States does not assume the role of trustee in such transactions, for such status would, in the opinion of your *amici*, be in direct conflict with the disestablishing effect of the statute. Thus, a *termination* statute raises a clear presumption that the area in question has been made a part of the public domain, free of tribal jurisdiction, and said presumption endures unless and until clear and convincing evidence is presented to the contrary. In such instances, the courts have had no difficulty in holding a disestablishment of the settled area. *Seymour* v. *Superintendent*, 368 U.S. 351, 354 (1962).

Reservation, California: Act of July 27, 1868, 15 Stat. 198, 221. *See also* the Klamath Termination Act, 25 U.S.C. §§ 564-564x, and the Menominee Termination Act, 25 U.S.C. §§ 891-902, the terms of which show quite clearly that Congress leaves no doubt on the face of a statute when termination of federal trust responsibility is intended.

[14] The surplus lands of the Navajo Indian Reservation, New Mexico, were "restored to the public domain and opened to settlement and entry by proclamation of the President." 35 Stat. 444, 457. The reservation lines of the Ponca, Otoe and Missouria Indian Reserations were "abolished." 33 Stat. 217, 218. The northern half of the Colville Indian Reservation was "vacated and restored to the public domain." 27 Stat. 62, 63. The Smith River Reservation was "discontinued". 15 Stat. 198, 221. The requirement of precise and unequivocal language for causing a termination of Indian rights is further evidenced by the holdings of this and other courts that certain treaty rights, such as hunting and fishing rights, survived even the clear and undisputed terminating effect of the Menominee and Klamath Termination Acts. *Menominee Tribe* v. *United States*, 391 U.S. 404 (1968); *Kimball* v. *Callahan*, 493 F.2d 564 (9th Cir. 1974).

III. ANALYSIS OF THE SETTLEMENT STATUTE WHICH OPENED THE LAKE TRAVERSE INDIAN RESERVATION TO NON-INDIAN SETTLEMENT (ACT OF MARCH 3, 1891, 26 STAT. 989, 1035).

As stated previously, it is our opinion that the Act of March 3, 1891, 26 Stat. 989, 1035, although a *cession* statute, did not disestablish the Lake Traverse Reservation; rather, that the land opened for settlement was intended by Congress to be part of a continuing reservation for the Sisseton and Wahpeton Indians and subject to their uninterrupted tribal jurisdiction. Our opinion is based upon an analysis of the terms of the statute in light of the following circumstances:

1. We believe that whatever the original purpose of the 1889 agreement, the terms of the 1891 Act transformed the agreement into an *implied cession-in-trust*,[15] thereby confirming a Congressional intent not to disestablish the Lake Traverse Reservation. Section 30 of that Act provides that the lands of Lake Traverse are to be sold only under the homestead and townsite laws of the United States for $2.50 per acre,[16] precisely the amount previously advanced to the Indians by the Government for these lands. It is therefore not unreasonable to conclude that the United States, rather than being regarded as vendee of the Lake Traverse Reservation, should be regarded as guarantor of the interests of the Sisseton and Wahpeton Indians. For, in effect, the United States simply prepaid the Indians for their surplus land, and recouped its expenses from the white settlers. Indeed, there are compelling reasons why the United

[15] We believe that it is reasonable to reclassify each *cession* statute into (1) an *implied cession-in-trust* statute or (2) an *implied termination statute*, depending upon a judicial finding in each case of Congressional intent as discerned from the statute's legislative history and surrounding circumstances.

[16] 26 Stat. 989, 1039.

States, in this particular case, would agree to assume a guarantor's role for the Sisseton and Wahpeton Indians. First, the Indians were in an improverished and deteriorating state at the time these negotiations were ongoing.[17] Second, the Sisseton and Wahpeton Indians had been loyal scouts in the service of the United States, but had not been paid or otherwise compensated for their faithful service to their country.[18] Therefore, it is not unreasonable to assume that our government would, in consideration of the Indians' demonstrated friendship and loyalty to the United States, assume an added responsibility toward these Indians in order to guarantee them a reasonable return for the homestead settlement of their lands.

2. It is significant that the 1891 Act opened for settlement all of the unallotted land on the Lake Traverse Reservation. Thus, this is not a situation in which the Indians would, in the face of an adverse court decision, be left at the very least with a diminished but adequate reservation. In fact, if this Court holds that the 1891 Act had the disestablishing effect attributed to it by the

[17] *See* Letter of A.C. Mellette, Governor of South Dakota, to John W. Noble, Secretary of the Interior (December 13, 1890), National Archives Records of the Bureau of Indian Affairs, Letters Received: Special Case 147, Letter No. 39462 (reproduced in Brief for the Petitioner at App. 54, *DeCoteau* v. *District County Court*, No. 73-1148).

[18] The government's special debt to these Indians was acknowledged specifically in Section 27 of the 1891 Act (26 Stat. at 1038), wherein money was appropriated for compensating

> . . . the scouts and soldiers of the Sisseton, Wahpeton, Medawakanton, and Wapakoota bands of Sioux Indians, who were enrolled and entered into the military service of the United States and served in suppressing what is known as the "Sioux outbreak of eighteen hundred and sixty-two;" or those who were enrolled and served in the armies of the United States in the war of the rebellion, and to the members of their families and descendants, now living, of such scouts and soldiers as are dead. . . .

State of South Dakota, there would no longer be, for all intents and purposes, a Lake Traverse Indian Reservation.[19]

In the opinion of your *amici*, it is simply inconceivable that the United States, as guardian and trustee of the Sisseton and Wahpeton Indians, intended to repay their loyal and faithful service by depriving them of their reservation. For this reason, any doubt as to the intent or effect of the 1889 agreement or 1891 Act, no matter how slight, should be resolved in favor of the Indians. *Worcester* v. *Georgia*, 31 U.S. 515 (1832).

3. Both the 1889 Agreement and the 1891 Act cite as specific authority therefor the General Allotment Act, Act of February 8, 1887, 24 Stat. 388.[20] This Court has previously stated, in *Mattz* v. *Arnett*, *supra*, that the "policy" of the General Allotment Act was "to continue the reservation system and the trust status of Indian lands. . . ." *Mattz* v. *Arnett*, 412 U.S. at 496. *Cf. United States* v. *Nice*, 241 U.S. 591 (1916). Inasmuch as the terms of the 1891 Act do not disestablish, abolish or make a part of the public domain the lands of the Lake Traverse Reservation, there is every reason to believe that Congress intended the reservation system to continue on the Lake Traverse Reservation, after the unallotted land had been opened to white settlement.

4. The United States correctly points out that the State of South Dakota's proposed construction of the

[19] A similar situation prevailed in *Mattz* where the act of June 17, 1892, 27 Stat. 52, opened for settlement all of the unallotted lands embraced within the Klamath River Reservation, and where this Court held, despite evidence in the record that very few Indians remained resident upon the reservation, that the settled lands had not been disestablished.

[20] 26 Stat. 1036, 1039. The 1889 agreement provides:

> Now, therefore, this agreement made and entered into in pursuance of the provisions of the Act of Congress approved February eight, eighteen hundred and eighty-seven. . . .

1889 agreement and 1891 Act would result in a "crazy-quilt pattern" of federal, state, and tribal jurisdiction, and would thus greviously encumber the right of the Sisseton and Wahpeton Indians to self-government.[21] This Court has previously held that in the absence of express Congressional action to the contrary, the reach of state jurisdiction over Indian tribes will be checked when it begins to infringe upon the right of reservation Indians "to make their own laws and be ruled by them." *Williams* v. *Lee*, 358 U.S. 217, 220 (1959). Where, as here, there is no express Congressional action disestablishing the reservation or extending state jurisdiction over the affairs of reservation Indians, the jurisdiction of the tribe over its entire reservation should remain unimpaired.

5. There has been a continuous federal presence on the Lake Traverse Reservation and an uninterrupted recognition by the federal government of trust responsibility, ranging from the maintenance of federal services, to the extension of allotments on the reservation, and through recent proposals to restore ceded reservation land to tribal ownership.[22] We know that the federal government's plenary authority over Indian affairs precludes the imposition of state jurisdiction, except in those instances where Congress has expressly provided that state law shall apply, or where state jurisdiction does not interfere with federal policies concerning Indian reservations. *Warren Trading Post Co.* v. *Arizona Tax Comm'n*, 380 U.S. 685 (1965); *Organized Village of Kake* v. *Egan*, 369 U.S. 60 (1962); *Williams* v. *Lee*,

[21] Memorandum for the United States as Amicus Curiae at 3-10, *DeCoteau* v. *District County Court*, No. 73-1148.

[22] Specific documentation of the federal governments continuous recognition of reservation status for the Lake Traverse Reservation is presented in great detail in Brief for the Petitioner at 33-46, *DeCoteau* v. *District County Court*, No. 73-1148.

358 U.S. 217 (1959). This Court has recently acknowledged the importance of federal presence and subsequent recognition of reservation status in determining the effect of settlement statutes. *Mattz* v. *Arnett*, 412 U.S. at 505. In light of the continuing federal recognition of reservation status, and in the absence of express Congressional action to the contrary, we believe that the Act of March 3, 1891, 26 Stat. 989, 1035, should not be construed as disestablishing the Lake Traverse Reservation.

6. It is important to note, as well, that whereas the Act of March 3, 1891, 26 Stat. 989 et. seq., opened for settlement the lands of seven different Indian tribes,[23] the specific terms of the 1891 Act applicable only to the Lake Traverse Reservation are distinct in at least four different respects from the provisions of the other six agreements, distinctions which your *amici* believe confirm a Congressional intent not to disturb the continuing reservation status of the Lake Traverse Reservation.

a. The preamble of the Sisseton-Wahpeton Agreement, quoting section 5 of the Dawes Act, 24 Stat. 388, 389 provides in pertinent part:

> Whereas, by section 5 of the Act of Congress entitled . . . it is provided '. . . *if in the opinion of the President it shall be for the best interests of said tribe*, it shall be lawful for the Secretary of the Interior to negotiate with such Indian tribe for the purchase and release by the said tribe, *in conformity with the treaty or statute under which such reservation is held*, of such portions of its reservations not allotted as such tribes shall from time to time, consent to sell, on such terms and conditions as shall be considered just and equitable between the United States and said tribe of Indians. . . .' [Emphasis supplied]

[23] In addition to the land of the Sisseton and Wahpeton Indians, the Act of March 3, 1891, 26 Stat. 989 opened the lands of the following Indian tribes to white settlement: (1) Citizen Band of Pottawatomie Indians (26 Stat. at 1016); (2) Absentee Shawnee Indians (26 Stat. at 1018); (3) Cheyenne and Arapahoe Indians (26 Stat. at 1022); (4) Coeur d'Alene Indians (26 Stat. at 1026); (5) Arickaree, Gros Ventre and Mandan Indians (26 Stat. at 1032); and (6) Crow Indians (26 Stat. at 1039).

Your *amici* believe that the language quoted above, which conditions the conveyance of Indian land upon the initiative and consent of the Indians, and which directs the President to act in "the best interests of said tribe", is equivalent, in many respects, to the important trusteeship provision contained in *trust-settlement* statutes and *express cession-in-trust* statutes, and emphasizes the trust obligations of the United States under this *cession* agreement sufficiently so as to transform it into an *implied cession-in-trust*.

b. Although, by the terms of the 1889 agreement and 1891 Act, the Sisseton and Wahpeton Indians agreed to cede, sell, relinquish, and convey to the United States the unallotted lands on their reservation, the distinct and unequivocal language of termination, present in most of the other agreements ratified by the Act of March 3, 1891, is not present.[24]

c. The Lake Traverse compact is the only one of the seven *cession* statutes contained in the Act of March 3, 1891 which does not provide for a proposed or actual survey of the ceded portion of the reservation or the

[24] For example, the Citizen Band of Pottawatomie Indians agreed to "cede, relinquish, and *forever and absolutely surrender to the United States all their claim, title and interest of every kind and character*. . . ." (26 Stat. at 1016), as did the Absentee Shawnee (26 Stat. at 1019). The Cheyenne and Arapahoe Indians agreed to "cede, convey, transfer, relinquish, and *surrender forever and absolutely, without any reservation whatever, express or implied, all their claim, title and interest, of every kind and character*. . . ." (26 Stat. at 1022). The Coeur d'Alene Indians agreed to "cede, grant, relinquish, and *quitclaim* to the United States all right, title and claim which they now have, or ever had. . . ." (26 Stat. at 1027, 1030). [Emphasis supplied].

unceded remainder of the reservation,[25] or for an express reservation of certain defined lands as a permanent home for the Indians.[26]

d. The Lake Traverse settlement statute is the only one which provides for a per acre consideration for the Indians. The remaining six settlement agreements provide for payments of lump sum consideration to the Indians for the ceded portion of their reservation.[27] As stated previously, this fact, taken together with all other circumstances touched upon in this brief, suggest quite strongly that the government intended to act as guarantor for the Sisseton and Wahpeton Indians, rather than as vendee of the Lake Traverse Reservation.

7. The agreement of 1889 and the confirmatory Act of March 3, 1891 are, in essence, contracts executed between the Sisseton and Wahpeton Indians and the federal government. It is significant therefore that, in this case, both contracting parties are in total agreement as to the intent and subsequent effect of these contracts.[28]

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[25] *See, e.g.*, 26 Stat. at 1016 (Citizen Band of Pottawotamie); 26 Stat. at 1019 (Absentee Shawnee).

[26] *See, e.g.*, 26 Stat. at 1027 (Coeur d'Alene); 26 Stat. at 1035 (Arickaree, Gros Ventre, Mandan).

[27] *Compare* 26 Stat. at 1036 (Sisseton-Wahpeton) *with* 26 Stat. at 1018 (Citizen Band of Pottawatomie); 26 Stat. at 1020 (Absentee Shawnee); 26 Stat. at 1024 (Cheyenne and Arapahoe); 26 Stat. at 1028, 1030 (Coeur d'Alene); 26 Stat. at 1033 (Arickaree, Gros Ventre, Mandan), 26 Stat. at 1040 (Crow).

[28] The opinion and supporting analysis of the United States has been expressed in the sister case of *DeCoteau* v. *District County Court*, No. 73-1148 (Memorandum for the United States as Amicus Curiae). The government concluded therein that the 1891 Act did not change the reservation boundaries of the Lake Traverse Indian Reservation, a conclusion fully in accord with the contentions of respondent Indians in the instant case and the petitioner Indians in *DeCoteau*. Brief for the Petitioner, *DeCoteau* v. *District County Court*, No. 73-1148.

Such a meeting of the minds, although not always conclusive, should be given great weight. *Cf. Leech Lake Band of Chippewa Indians* v. *Herbst*, 334 F.Supp. 1001, 1004 (D. Minn. 1971).

CONCLUSION

Your *amici* submit that when the Act of March 3, 1891, 26 Stat. 989, 1035, is viewed against the "backdrop" of Indian tribal sovereignty, *McClanahan* v. *State Tax Comm'n*, *supra*, and the circumstances set forth above, it is clear that said Act did not disestablish the Lake Traverse Indian Reservation, or, in the alternative, that inasmuch as the Act of March 3, 1891 is ambiguous on its face and its legisltaive history and surrounding circumstances can be cited as support for either disestablishment or continuing reservation status, the doubts as to the continuing validity of the Lake Traverse Reservation must be resolved in favor of the Sisseton and Wahpeton Indians. *Worcester* v. *Georgia*, *supra*.

For the foregoing reasons, the decision of the Eighth Circuit in the instant case, *Erickson* v. *Feather*, No. 73-1500, should be affirmed and, consequently, the decision of the South Dakota Supreme Court in *DeCoteau* v. *District County Court*, No. 73-1148, should be reversed.

Respectfully submitted,

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